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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-847

COMMON CAUSE, *et al.*, *Appellants,*

v.

HARRISON SCHMITT, *et al.*, *Appellees.*

No. 80-1067

FEDERAL ELECTION COMMISSION, *Appellant,*

v.

AMERICANS FOR CHANGE, *et al.*, *Appellees.*

On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLEE AMERICANS FOR AN EFFECTIVE PRESIDENCY

RALPH K. WINTER
323 Sterling Law Building
127 Wall Street
New Haven, Conn. 06520
(203) 436-4681

RODERICK M. HILLS
ROBERT K. BURGESS *
ROBERT B. SHANKS
EDWARD SONNENSCHEIN, JR.
LATHAM, WATKINS & HILLS
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 828-4400

Attorneys for Appellee
AMERICANS FOR AN
EFFECTIVE PRESIDENCY

* *Counsel of Record*

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QUESTIONS PRESENTED

Section 9012(f) of the Presidential Election Campaign Fund Act places a $1,000 limit on expenditures by political committees, other than a candidate's authorized committees, which further the election of the presidential candidate. A three-judge district court, sitting in the District of Columbia, declared section 9012(f) unconstitutional based on this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), holding, among other things, that a similar provision of the Federal Election Campaign Act unconstitutionally infringed upon the freedoms of speech and association.*

The questions presented in this case are:

1. Whether section 9012(f) was intended to reach independent expenditures by groups not affiliated with, or authorized by, a candidate's official campaign organization.

2. Whether under this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), section 9012(f) of the Presidential Election Campaign Fund Act violates the First Amendment guarantees of freedom of speech and association and the equal protection component of the Fifth Amendment.

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* In addition to the parties named in the caption, the other parties to the proceeding below were Americans for an Effective Presidency, on whose behalf this Brief is submitted, David Cohen, Winifred Long, Carl T. Curtis, and Fund for a Conservative Majority.

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On Appeal from the United States District Court for the District of Columbia

BRIEF OF APPELLEE AMERICANS FOR AN EFFECTIVE PRESIDENCY

These consolidated cases appeal a decision of a three-judge United States District Court sitting in the District of Columbia, which held 26 U.S.C. §9012(f) unconstitutional under the First Amendment. The District Court's opinion and order are not yet published but are reproduced as Appendix A to the Jurisdictional Statement filed by appellant Common Cause in No. 80-847.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly. . . .

26 U.S.C. §9012(f) provides:

(f) Unauthorized expenditures and contributions.

(1) Except as provided in paragraph (2), it shall be unlawful for any political committee which is not an authorized committee with respect to the eligible candidates of a political party for President and Vice President in a presidential election knowingly and willfully to incur expenditures to further the election of such candidates, which would constitute qualified campaign expenses if incurred by an authorized committee of such candidates, in an aggregate amount exceeding $1,000.

(2) This subsection shall not apply to —

(A) expenditures by a broadcaster regulated by the Federal Communications Commission, or by a periodical publication, in reporting the news or in taking editorial positions, or

(B) expenditures by any organization described in section 501(c) of this title which is exempt from tax under section 501(a) in communicating to its members the views of that organization.

(3) Any political committee which violates paragraph (1) shall be fined not more than $5,000, and any officer or member of such committee who knowingly and willfully consents to such violation and any other individual who knowingly and willfully violates paragraph (1) shall be fined not more than $5,000, or imprisoned not more than one year, or both.

STATEMENT OF THE CASE

A. The Statutory Framework.

Presidential election campaigns are regulated by the Federal Election Campaign Act ("FECA"), 2 U.S.C. §§431-55 (1976 & Supp. III 1979), and the Presidential Election Campaign Fund Act ("Fund Act"), 26 U.S.C. §§9001-9013 (1976 & Supp. III).[1] Both statutes were originally enacted in 1971

[1] Except as otherwise noted, all citations to FECA and the Fund Act are to the current versions, as amended, Titles 2 and 26 of the United States Code, respectively.

and substantially amended in 1974, when Congress added contribution and expenditure limitations to FECA, added automatic appropriations to the federal election fund, and established the amount of the candidates' entitlement.

Through FECA, as amended, Congress placed limits on the amount of money individuals and groups could contribute to candidates for federal elections and to political committees, and ceilings on the total expenditures permitted in support of such candidates from any source — the candidates themselves, their official organizations, and other supporters not part of the official campaigns. Specifically, FECA limited expenditures independent of a candidate's campaign to $1,000. This limit applied to all federal campaigns, including presidential and vice-presidential campaigns.

The Fund Act was enacted as subtitle H of the Internal Revenue Code and provided for public funding of general presidential and vice-presidential election campaigns through the Presidential Election Campaign Fund, financed through a voluntary taxpayer check-off system. Major party candidates who satisfy the Act's eligibility requirements[2] can elect to receive payments from the Fund to defray campaign expenses incurred by the candidates or their authorized committees.[3] 26 U.S.C. §§9012(c); 9002(11) (qualified campaign expenses).

In order to receive public financing under the Fund Act, candidates must agree that they, and their authorized committees, will be bound by other restrictions on contributions and on the amounts of qualified campaign expenses they incur, 26 U.S.C. §§9002(4) and 9003, including the requirements that they not incur aggregate expenses in excess of the amount of public funding and not accept private contributions to defray their campaign expenses. 26 U.S.C. §9003(b). The effect of the candidate's agreement to abide by statutory limits on cam-

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[2] These requirements are set forth in 26 U.S.C. §9003.

[3] The term "authorized committee" is defined by the Fund Act to mean any political committee authorized in writing by a candidate. 26 U.S.C. §9002(1).

paign expenditures and by the prohibition on receiving private contributions is to forbid all expenditures by individuals and groups in coordination with the candidate's campaign. This result is brought about by the definition of "contribution," which includes all coordinated expenditures. 2 U.S.C. §441a(a)(7)(B).

Section 9012(f) of the Fund Act, the section at issue here, prohibits any political committee,[4] other than an authorized committee, from incurring any expenditures in excess of $1,000 "to further the election" of a candidate who has qualified to receive funds. Given the Act's broad definition of political committee, the effect of a literal reading of section 9012(f) is to prohibit any unauthorized group or political committee[5] from making independent expenditures[6] in excess of $1,000, if that expenditure will "further the election" of a candidate who has elected to receive public funding under the Fund Act.

Section 9012(f) does not apply to broadcasters or periodical publications reporting news or taking editorial positions, 26 U.S.C. §9012(f)(2)(A), or to expenditures by tax exempt organizations under section 501(c) of the Internal Revenue

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[4] The Fund Act defines the term "political committee" to mean "any committee, association, or organization (whether or not incorporated) which accepts contributions or makes expenditures for the purpose of influencing, or attempting to influence, the nomination or election of one or more individuals to Federal, State, or local elective public office." 26 U.S.C. §9002(9).

[5] The Federal Election Commission ("FEC") has defined an "unauthorized committee" as "a political commitee which has not been authorized in writing by a candidate to solicit or receive contributions or make expenditures on behalf of such candidate. . . ." 11 C.F.R. §100.5(f)(2) (1980). Thus all political committees are either "authorized," *see* note 3, *supra,* or "unauthorized."

[6] The term "independent expenditure" is defined at 2 U.S.C. §431(17), and by the FEC's regulations, 11 C.F.R. §109.1(a)(1980), as one " made without cooperation or consultation with [a] candidate, or any authorized committee or agent of such candidate, and which is not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate." 2 U.S.C. §431(17).

Code "in communicating to its members the views of that organization." 26 U.S.C. §9012(f)(2)(B). Thus a wide variety of private organizations including, among others, labor and agricultural organizations, the chamber of commerce, fraternal organizations, and certain non-profit corporations, are exempt from section 9012(f)'s $1,000 limitation applicable to other groups.

The FEC has exclusive jurisdiction to enforce the Fund Act. 2 U.S.C. §437c(b)(1). Political committees which violate §9012(f) are subject to criminal penalties under 26 U.S.C. §9012(f)(3).

Section 9011(b) of the Fund Act authorizes the FEC, the national committee of any political party, and individuals eligible to vote for President, to institute actions where appropriate "to implement or construe" provisions of the Fund Act and establishes an expedited procedure by which such actions may be adjudicated by a three-judge court with a right of direct appeal to this Court. *Id.*

B. The Facts Giving Rise to These Cases.

Ronald Reagan, the 1980 Republican presidential candidate, opted for public financing under the Fund Act. The Reagan campaign and its authorized political committees[7] (other than the Republican National Committee) were therefore prohibited from accepting private contributions or from spending more than the amount of the public grant.[8]

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[7] As used in this brief, the terms "Reagan campaign" and "the official Reagan campaign" refer to Ronald Reagan, his authorized committees and their agents. Mr. Reagan's authorized committees included the Reagan for President Committee, the Reagan for President General Election Committee, the Reagan for President Compliance Fund, and the 1980 Rupublican Presidential Unity Committee. Statement of Candidacy of Ronald Reagan, filed with FEC and dated June 26, 1980. The Republican National Committee was also an authorized committee and agent of the Reagan campaign.

[8] National party committees affiliated with a candidate are permitted to spend an amount equal to two cents times the voting age population of the United States. 2 U.S.C. §441a(d)(2).

Appellees Americans for an Effective Presidency ("AEP"), Americans for Change ("AFC"), and Fund for a Conservative Majority ("FCM") are political committees within the meaning of the Fund Act. Each sought to mount a fundraising and advertising campaign in support of Ronald Reagan for President and of various other candidates for public office. None of the appellees is an "authorized committee" of Ronald Reagan, and all operated independently of the Reagan campaign.[9]

All relevant facts before the district court were undisputed. Appellees solicited contributions from individuals who favored Ronald Reagan for President.[10] Appellees' literature and solicitation materials detailed their support for Ronald Reagan and other candidates and outlined their intention to spend the sums collected to publicize their support for such candidates. The money raised was used to engage professional media and political consultants, to purchase advertisements, and generally to publicize their political views before the November election.

C. The Proceedings Below.

On July 1, 1980, Common Cause filed a Complaint against AFC and its Chairman and Treasurer. Count I of the Complaint alleged that AFC's political activities, even though independent and not associated with the Reagan campaign, violated 26 U.S.C. §9012(f)'s $1,000 ceiling on independent

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[9] The FEC has never alleged that appellees' activities were not independent of the Reagan campaign. Common Cause originally alleged in Count II of its Amended Complaint that appellees' activities were coordinated with the Reagan campaign, but this count was dismissed by the district court on jurisdictional grounds and for failure to state a claim for relief, as stated in parts V. A and V. B of the court's opinion. See FEC App. A to Jurisdictional Statement at 28a-32a. Common Cause has not appealed from this dismissal. Common Cause Jurisdictional Statement at 6, n.7. Thus, for the purposes of this appeal, all parties assume *arguendo* that the expenditures of AFC, AEP and FCM were made independently of the official Reagan campaign. *Id.*

[10] All contributions to appellee committees were subject to the $5,000 contribution limitation imposed by §441a of FECA.

expenditures by political committees. Count II of the Complaint alleged that AFC was in fact not independent of the official Reagan campaign and that AFC's receipts and expenditures were therefore contributions to, or expenditures by, the Reagan campaign, thereby violating the Fund Act's restrictions on contributions and expenditures. The Complaint sought declaratory and injunctive relief and requested that a three-judge court be convened and that the action be expedited pursuant to the procedure provided in 26 U.S.C. § 9011(b) for actions as may be appropriate "to implement or construe" the Fund Act. Common Cause also moved for immediate discovery against AFC.[11]

On July 15, 1980, the FEC filed an action against AFC, AEP and FCM contending that appellees' independent political activities violated section 9012(f)'s restriction on expenditures by political committees in excess of $1,000 and seeking declaratory relief, including a declaration that section 9012(f) was constitutional.

Shortly thereafter, on July 17, 1980, Common Cause amended its Complaint to add appellees AEP and FCM as defendants. Common Cause then moved to consolidate the two actions and to intervene as a plaintiff in the FEC's action.

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[11] Common Cause argues strenuously that the district court erred in holding section 9012(f) unconstitutional without permitting discovery against appelless, Common Cause Breif at 41-44, despite the fact that Common Cause took the position below that it required discovery primarily in order to support the allegations in Count II of its Complaint, that appellees were not in fact independent of the Reagan campaign. *See Common Cause* v. *Schmitt*, Transcript of Hearings (August 6, 1980) at 54. Yet Common Cause has not appealed from the district court's dismissal of Count II. *See* note 9, *supra*. Inasmuch as Common Cause and the FEC do not contest appellees' independence from the Reagan campaign, and appellees do not contest the fact that they are "political committees," factual discovery pertaining to these particular committees will serve no useful purpose.

Appellees moved for dismissal or, in the alternative, for summary judgment in both actions on the ground, among others, that the restrictions imposed by section 9012(f) on independent expenditures by political committees are unconstitutional under this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976). The appellees and the FEC also sought to dismiss Common Cause's action on the ground that Common Cause lacked standing to bring an action to enforce the Fund Act, and that the three-judge court was without jurisdiction to hear its claim.[12]

The three-judge district court was convened on July 17, 1980 pursuant to appellants' request for expedited treatment under section 9011(b). The court stayed all discovery and set briefing and argument schedules on appellees' motions for dismissal and summary judgment and on the jurisdictional issue. On August 28, 1980, the court issued orders granting appellees' motions for summary judgment in the FEC's action and dismissing Count I of Common Cause's action on the basis of the court's disposition of the Commission's case. Count II of Common Cause's action was dismissed for lack of jurisdiction and failure to state a claim. FEC Jurisdictional Statement App. B. Common Cause has not appealed from the district court's dismissal of this count.

On September 25, 1980, the district court issued an order consolidating the two cases. FEC Jurisdictional Statement App. C. On September 30, 1980, the court issued its opinion, authored by Judge Wilkey. FEC Jurisdictional Statement App. A.

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[12] Appellees argued that the FEC has exclusive jurisdiction over the civil enforcement of the election laws, including the Fund Act. 2 U.S.C. §437c(b)(1). Common Cause's Amended Complaint sought a declaration that appellees had acted, or would act, in violation of section 9012(f) and asserted that the three-judge court had jurisdiction over this action under section 9011(b). But the language of this section does not alter the FEC's exclusive enforcement responsibility or grant Common Cause a private right of action to enforce section 9012(f), a criminal statute, against another private party. *See generally*, Brief for Intervenor-Appellee Federal Election Commission.

D. The Opinion of the Three-Judge Court.

The three-judge district court based its analysis of section 9012(f) squarely on this Court's decision in *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

Utilizing the *Buckley* analysis, the district court carefully weighed the governmental interests allegedly served by section 9012(f)'s apparent $1,000 limit on independent expenditures by groups and the resultant impact on political speech and associational activity. It concluded that the proposed spending by appellee committees constituted independent expenditures constitutionally protected under *Buckley*. Because the district court held section 9012(f) facially unconstitutional, it had no need to rest its decision on any facts peculiar to these cases.

SUMMARY OF ARGUMENT

Section 9012(f) has an unusually explicit legislative history. On several occasions prior to passage of the Fund Act, the question of independent expenditures was raised. On each such occasion, the bill's sponsor, Senator Pastore, responded that independent expenditures were not limited by the terms of the provision that later became section 9012(f). The Federal Eiection Commission itself explicitly declined in 1977 to promulgate regulations under that provision which would have applied it to independent expenditures but limited its effect to state or local party committees. Until initiation of the present eve-of-election lawsuit, no one believed that section 9012(f) applied to independent expenditures.

Read literally and without regard to clearly expressed legislative intent, section 9012(f) is facially unconstitutional. It grossly intrudes on a vast area of mainstream political activity, including issue discussion, distribution of factual information such as voting records, and even scholarly research. Because it forbids almost all political advocacy which is not funded by national campaign committees or state or local parties, it conditions speech by groups upon the approval of party officials, in effect censoring the content of speech. By

restricting the activities of groups of persons who can participate meaningfully only in concert with others, section 9012(f) infringes on freedom of association.

Section 9012(f) leaves the wealthy free to make unlimited independent expenditures while silencing the less well-to-do. While section 9012(f) quite rightly exempts the institutional press from its terms, it unconstitutionally discriminates against groups like AEP seeking to publish their own messages, including republication of press editorials, while affording unjustifiable special privileges to labor unions, the chamber of commerce, and other non-profit groups. Its pervasive language is so vague that it chills a wide range of perfectly legitimate activity.

ARGUMENT

I

Congress Never Intended Section 9012(f) To Limit Independent Expenditures.

Section 9012(f) was never intended by Congress to limit independent expenditures. To the contrary, its sponsor specifically and deliberately stated that such expenditures were exempt from its terms. Judicial decisions have fully supported this view, and subsequent regulations, as well as administrative rulings, of the FEC accepted that construction until this eve-of-election lawsuit was brought.

A. The History Of Section 9012(f)'s Passage Demonstrates A Congressional Intent To Exclude Independent Expenditures.

When section 9012(f) was passed, the public financing provisions were merely an alternative to private financing available without any limitations on contributions. Just prior to introduction of the bill that later became Chapter 26

(general election federal funding), the Senate had adopted a bill which became the 1971 FECA. This bill contained two provisions of crucial importance to this case.

The first was a limitation, section 104(a)(1) of Title I, on expenditures by candidates for federal office (including presidential candidates) for use of the communications media. Congress, hoping to prohibit independent expenditures for media activities which, when added to candidate expenditures, would exceed the limits, enacted a provision which forbade the media from charging anyone using their facilities on behalf of a candidate unless the candidate certified that the payment would not cause him or her to exceed the statutory limit. *Id.*, §104(b).[13] In effect, no expenditure could be accepted by a media facility in a presidential election campaign without the candidate's permission.

The second important provision of the 1971 FECA was a requirement for financial disclosure by "political committees" defined as "any committee, association or organization which accepts contributions or makes expenditures. . . ." Federal Election Campaign Act of 1971, §301(d). The words "or other group," which appear in the 1974 FECA, were not included. The term "expenditure" was defined to include payments "for the purpose of influencing . . . " a federal election. *Id.*, §301(f)(1).

The legislative history of these definitions is sparse. Indeed, the very next year, the United States Court of Appeals for the Second Circuit noted that the Senate Report might

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[13] Title I, §104(b) provided:

"No person may make any charge for the use by or on behalf of any legally qualified candidate for Federal elective office (or for nomination to such office) of any newspaper, magazine or outdoor advertising facility, unless such candidate (or a person specifically authorized by such candidate in writing to do so) certifies in writing to the person making such charge that the payment of such charge will not violate [the spending limitation]."

"be searched in vain for any passage which throws further light upon the meaning of 'political committee' or 'made for the purpose of influencing.' " *United States* v. *National Committee For Impeachment*, 469 F.2d 1135, 1139 (2d Cir. 1972).

In this statutory context, Senator Pastore introduced Chapter 26 as an amendment to a pending tax bill. "Political committee" was defined in terms essentially identical to the 1971 FECA, including omission of the words "or other group." A full Senate debate took place, and much confusion surrounded the meaning of "political committee." But one thing was made clear: that term was not intended to apply to independent expenditures.

Senator Taft sought to amend the provision that would become section 9012(f) by expanding the groups affected to include "[a]ny corporation, labor organization, partnership, association, political committee, political education committee, or any other committee." He made it clear that his amendment was designed to dispel any doubt about the inclusion of organizations such as COPE or AMPAC within its terms. 117 CONG. REC. S 19151-19152 (daily ed. November 19, 1971). Senator Pastore opposed this initiative, largely on the ground that independent expenditures should be exempt. The following colloquy took place:

> Mr. TAFT. I suggest if the amount put on as a limitation of expenditures, as an attempt to put an overall limit on expenditures in presidential campaigns is included, if this is to have meaning, it has to have that.
>
> Mr. PASTORE. There is a distinction. Usually a political committee is formed for the purpose of directly aiding that candidate and there is no question about being authorized by that candidate. We wrote something to that effect in the other bill. How far are we going to go without obligating independent organizations and committees furthering the promotion of a particular candidate on their own?
>
> I know what the Senator is trying to accomplish but I am wondering on this amendment whether or not we may

be opening Pandora's box. There is no question about what the Senator said.

Mr. Taft continued:

> Mr. TAFT. The Senator is aware of a good many cases of committees organized in a good many other areas in the labor area. We have heard a great deal of screaming about AMPAC and a number of other organizations of this kind that have been set up and continue to collect funds and make contributions for candidates. I think all these contributions should come in. I think they should all be under the limitation. If there is going to be a limitation, let there be a limitation and a limitation that is meaningful.
>
> I predict this amendment will be defeated on the same kind of party line as other amendments. I suspect that will be true. But I bring the amendment up today because this is a matter on which we are going to have to make a decision on this kind of an amendment, and I think this is the direction in which it will be considered. *Id.*, S 19152.

Later in the same debate, Senator Pastore said:

> Mr. PASTORE. Mr. President, I want to say to the Senator from Ohio that this is the most sensitive area in which we can legislate. This problem was in the other bill. The only problem is that the Senator from Ohio always keeps on hammering COPE, instead of hammering at the Chamber of Commerce.
>
> Mr. TAFT. Or an oil company.
>
> Mr. PASTORE. The Senator keeps hammering at COPE, COPE. The devil appears to be COPE. It appears to be COPE every time. It is a tough area in which to legislate. For example, anyone is entitled to think as he likes and to say what he thinks. He is not authorized by the candidate to do so. He gets together as a committee because they think it is to their advantage, whether school teachers, COPE, or some other group. And they issue an article that costs $1,500. The candidate does not know what it is about. He never heard of the article, much less read it. Under this law, this group would be subject to a $5,000 fine. It is hard for me to buy. It is close to the line. *Id.*, S 19155.

On the basis of this colloquy, it must be concluded that the sponsor of the amendment, Senator Pastore, had no intention of limiting independent expenditures, even when made by large, centrally directed groups able to amass large amounts of money.

Other debate clarified the matter even further. Senator Goldwater posed a hypothetical involving independent spending which Senator Pastore directly answered:

> Mr. GOLDWATER. . . . Suppose his brother buys some time on television and the candidate says, "I did not know my brother was spending money that way." There is no way we can prevent that.
>
> * * *
>
> Mr. PASTORE. That is covered by S.382. [1971 FECA] I keep repeating that. What we are trying to do is to characterize this particular bill as complementary legislation on campaign expenditures and campaign financing. This is the financing part. We have already passed the other bill and I am hopeful that the House will pass the same bill and it will become law. . . .
>
> On the proposition the Senator is talking about, we took care of that 3 months ago when we passed S.382. I would hope the House would pass it. I would admit that this bill does not cure that part. But we have already taken care of that. Hopefully, that bill will pass in the House and the President will sign it and the two together will give us a complete package. *Id.*, S 18938 (daily ed. November 18, 1971).

This is a clear statement by the sponsor that whatever limitations on independent expenditures Congress intended were included in the 1971 FECA, and "this bill does not cure that part."

The matter did not rest there, however. On yet another occasion, Senator Pastore was asked about independent expenditures and again, without challenge from any other Senator, he gave an unequivocal answer:

> Mr. MAGNUSON. I want to ask the Senator from Rhode Island a question that has been bothering me

throughout this debate. This may not be a loophole. Suppose a group of people wanted to get together and support Mr. A for President, and they are going to devote their time to go out and do what they can for him. They may hire a hall for a mass meeting. Would that be in violation?

Mr. PASTORE. Does the Senator mean if they acted on their own?

Mr. MAGNUSON. They would get together. I suppose it would be difficult to act on their own. Perhaps they would have a meeting place where they rent a hall, and they would spread out on election day to go to the polls to support Mr. A. There would be no money raised except their own expenses, which would amount to nothing, comparatively.

Mr. PASTORE. That raises a very sensitive area. We struggled with that on the campaign expenditures limitations. The Senator is talking about individuals who, absolutely independent of the candidate, on their own, made some effort?

Mr. MAGNUSON. Yes.

* * *

Mr. PASTORE. To answer the Senator, *we do nothing to impinge upon freedom of speech and freedeom of activity. So long as the candidate knows nothing about it and there is no subterfuge about it, the people are entitled to act as they will. Id.*, S 19302 (daily ed. November 22, 1971) (emphasis added).

It is thus absolutely clear that a "political committee" under section 9012(f) was not intended to include organizations or groups engaged in independent spending.

B. Subsequent Interpretations Of Section 9012(f) By The Courts, Congress, And The Federal Election Commission Further Support The Fact That It Excludes Independent Expenditures.

Subsequent judicial interpretations have reached similar conclusions. In both *American Civil Liberties Union* v. *Jenn-*

ings, 366 F. Supp. 1041 (D.D.C. 1973), and *National Committee For Impeachment, supra,* 469 F.2d 1135, three-judge courts in the District of Columbia and the Second Circuit concluded that the modifying words, "made for the purpose of influencing," used in the definitional sections of the 1971 FECA included only those expenditures which are authorized or controlled by the candidate. Since that very language was taken from the 1971 FECA and used in Chapter 26's definition of "political committee," 26 U.S.C. §9002(9) ("expenditures for the purpose of influencing"), no historical case can be made for extending section 9012(f) to independent expenditures.

Jennings struck down the certification procedure relating to media expenditures, and in 1974 Congress amended the FECA to provide a limit on all independent expenditures, 18 U.S.C. §608(e)(1). That provision read:

> (1) No person may make any expenditure (other than an expenditure made by or on behalf of a candidate within the meaning of subsection (c)(2) (B)) relative to a clearly identified candidate during a calendar year which, when added to all other expenditures made by such person during the year advocating the election or defeat of such candidate, exceeds $1,000.

Section 608(e)(1) was, of course, struck down in *Buckley, supra,* 424 U.S. at 39-51.

After the *Buckley* decision, Congress amended the FECA to conform to this Court's ruling. Its understanding clearly was that no limitation on independent spending was constitutionally permissible and that, after *Buckley,* none existed. Indeed, one cannot find in the legislative history following *Buckley* a single reference by any Senator or Congressman to indicate that the election laws contained another limitation on independent expenditures. In the context of the post-*Buckley* amendments, surely section 9012(f) would have been examined and discussed to ensure its constitutionality following the demise of section 608(e)(1) if it restricted independent expenditures.

As Senator Cannon characterized the decision on the floor on March 18, 1976,

> "an *organization* could spend all of the money it wanted of its own or spend in association with others for the defeat or for the election of a candidate." 122 CONG. REC. S 3800 (daily ed. March 18, 1976). (Emphasis added).

And Senator Buckley summarized Congress' view of the lawsuit he had brought when he stated:

> "[T]he practical consensus of that decision is that we are going to see more and more *well-organized, well-financed groups operating outside of an individual campaign, parallel to it, but independently." Id.* (Emphasis added).

Other senators expressed their understanding that under *Buckley,* union and corporate political action committees (PAC's) could make independent expenditures without limitation. *See* remarks of Senator Mondale, *Hearings on S. 2611 Before the Subcommittee on Privileges and Elections of the Committee on Rules and Administration* 87, 94th Cong., 2d Sess. (1976), and Senator Chiles, 122 CONG. REC. S 3802 (daily ed. March 18, 1976).

This understanding is most tellingly related by the statements of Senator Kennedy, a leading proponent of campaign regulation. He cited the "problems of independent spending," as well as spending by wealthy candidates, resulting from *Buckley* and proceeded to name the tools at hand for controlling these "problems." They were: disclosure of independent spending; the standards for independence from the official campaign organization; and the limitations on the expenditures of publicly funded candidates from their *personal* resources. He did not mention any provisions which would have limited *independent* expenditures because of the acceptance of public funding; indeed, he stated that "[i]f there is . . . cooperation, the expenditure is a contribution and will be subject to the spending limits." 122 CONG. REC. S 3801 (daily ed. March 18, 1976) (emphasis added).

Prior to the position taken in this eve-of-election lawsuit, the Commission itself did not view section 9012(f) as applicable to independent expenditures, whether made by individuals, groups, or any other political committees. In 1976, following the *Buckley* decision, the Commission expressly considered a proposed regulation with respect to section 9012(f) similar to the position it takes here, but declined to adopt it.[14] Instead the Commission adopted a regulation allowing state or local party committees to make expenditures up to $1,000 furthering all nominees on the ticket, including the presidential candidate. 11 C.F.R. §§110.7(a)(5), 110.7(b)(4), 146.1 (1980). Other than section 9012(f), there was no statutory authority permitting such expenditures. Congress did not disapprove these regulations after they were submitted to the legislative veto process under section 438(c).[15]

Clearly, if section 9012(f) limits independent expenditures, the promulgation of regulations in 1977 was the proper occasion for the Commission to elaborate appropriate definitions and substantive rules. It was also the proper occasion for appellant Common Cause to propose them. The failure of both appellants to act on that occasion merely underlines the lack of merit in the contentions they now press with such assurance.

Indeed, until this very lawsuit, the Commission has routinely acted as though section 9012(f) applied only to candidate controlled committees.

The Commission adopted regulations in 1977 which, among other things, authorize unlimited independent expenditures by any "person," defined to mean "individual, partnership, committee, association, or any organization or group of persons," with certain exceptions not here relevant. 11

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[14] *See* Hearings on Part 140 (General Election Financing) Before the Federal Election Commision (July 7, 1976).

[15] These regulations were dropped after the 1980 FECA amendments permitting local party spending of certain kinds. *See* 2 U.S.C. §431(8)(b)(x)(xii).

C.F.R. §§109.1(a) and (b)(1). More recently, in November 1979, the Commission specifically acknowledged in the *Republican National Committee* case that "[p]laintiffs are free to contribute money to political committees (other than the candidates' authorized committees) to make unlimited independent expenditures" in support of a publicly funded candidate for President in the general election. *Republican National Committee* v. *Federal Election Commission,* 616 F.2d 1 (2d Cir. 1980), *aff'd,* 445 U.S. 955 (1980) (FEC Brief at 48).

The Commission has issued public letters and opinions consistent with the position that section 9012(f) does not limit independent expenditures. For example, the Commission stated in connection with the 1976 general election that the "GOP Feminist Caucus" could expend funds with "no limitation" for the production of campaign buttons supporting President Ford in the general election if its "expenses for the buttons [came] within the definition of an independent expenditure. . . . Expenses incurred during the general election campaign period must qualify as independent expenditures since as a general rule contributions to Presidential candidates who receive funding are prohibited." Informational Letter re: AOR 1976-28, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6062.

Similarly, the Commission implicitly acknowledged the legitimacy of independent expenditures in support of then candidate Carter in the 1976 general election. In describing the form of disclaimer to be used on communications of the "Citizens for Carter" committee, "an independent political action committee," the Commission discussed expenditures for such communications but did not mention section 9012(f). AO 1976-35, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5206. Discussion of the proper disclaimer to be attached to communications is meaningless unless expenditures for the communications are lawful in the first instance. *See also* Informational Letter to Ralph H. Goettler, October 4, 1976 (referring to the requirement of independence in connection with "independent expenditures on behalf of President Ford" by "an individual or committee").

Last year, in AO 1979-80, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5469, a question was posed to the Commission concerning the possible use by an independent political committee of an advertising firm which had previously been engaged by a candidate for the nomination for President. The Commission responded that if the "candidate for nomination becomes the nominee, [the independent political committee] would presumably be precluded from engaging the advertising firm to make independent expenditures during the general election." The Commission did not address the propriety of independent expenditures during the general election, but rather addressed only the need for such expenditures to be independent.[16]

This history of section 9012(f) reveals not a trace of congressional intent to limit independent expenditures. Indeed, Senator Pastore repeatedly stated his desire to avoid legislation raising such a delicate constitutional issue. Despite section 9012(f)'s overly broad and vague terms, it was never intended to reach independent expenditures.

II

Applied Literally, Section 9012(f) Is Facially Unconstitutional.

A. Section 9012(f) Is A Gross Intrusion On Protected Speech.

1. The Language Of Section 9012(f) Covers A Vast Area Of Protected Speech.

The language of section 9012(f), if applied without regard to congressional intent, will affect a vast area of mainstream political activity.

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[16] Furthermore, the Commission did not indicate that independent expenditures would in any way be limited by virtue of the fact that the advisory opinion request clearly contemplated a professional media campaign.

"Any political committee" not authorized by a candidate is prohibited by the terms of section 9012(f) from making "expenditures" in excess of $1,000 "to further the election" of a candidate which would constitute "qualified campaign expenses" if made by that candidate. *Id.*

The statutory definition of "political committee" includes "any committee, association or organization (whether or not incorporated)," 26 U.S.C. §9002(9), terms sufficiently broad, if read apart from their legislative intent, to cover any grouping of persons making a concerted and organized effort to engage in political speech.

The nature of the expenditures subject to section 9012(f) is virtually unlimited, for it covers payment for anything which would be a "qualified campaign expense" if made by a candidate, which in turn is defined as any expense incurred "to further" the candidate's election. 26 U.S.C. §9002(11). The statute thus includes within its prohibitions every kind of expenditure which might be made by presidential campaigns, including an array of issue-oriented activities in addition to express advocacy of a candidate's election.

For example, research into a presidential candidate's stance on issues while holding earlier public office, the printing and circulation of voting records, the distribution of instructions on how to split a ticket, publication of a point of view on a potential issue, printing a newsletter describing a candidate's position on certain matters, support for a scholar writing a book examining the credentials of various candidates and concluding that one or the other is preferable, bringing or defending litigation involving ballot access or campaign finance in a presidential election, are just some of the kinds of activities for which expenditures by a campaign would be "qualified campaign expenses."

As a consequence, section 9012(f), read literally, impacts on issue discussion as well as explicit candidate advocacy. In the 1980 election, for example, Mr. Carter supported the SALT II agreement while Mr. Reagan opposed it. A group of

individuals sharing the cost — or raising money to share the cost — of a newspaper advertisement in late October extolling the virtues of SALT II would fall within section 9012(f)'s proscriptions. Political activists purchasing such an ad could hardly claim indifference to the outcome of the election or deny that the ad might "further" Mr. Carter's chances. The ad would surely be a "qualified campaign expense" if purchased directly by the Carter campaign.

During the fall of 1980, many law students and faculty were apprehensive about the effect of a Reagan victory upon legal services for the poor and appointments to this Court. A group which set up a table in the hall of the law school and solicited contributions to fund publicity and other activities in the particular locality highlighting these issues would have violated section 9012(f) if they raised and spent in excess of $1,000.

A scholar writing a book or pamphlet on the relative credentials of presidential candidates might easily run afoul of section 9012(f). Support for such work could not be safely given by any group of persons or organization perceived as favoring whichever candidate got the better of the comparison. In September 1960, for example, Professor Arthur Schlesinger, Jr. published *Kennedy or Nixon: Does It Make Any Difference?* Financial support for research, footnoting, typing, and other support exceeding $1,000 for such a work today would be possible only if undertaken by the author individually, or by an authorized committee of the candidate being supported.

In the recent election, groups opposing the candidacy of Congressman Anderson might reasonably fear that independent expenditures opposing his election would be viewed as "furthering" the election of Mr. Carter.

The present litigation itself may be a violation of section 9012(f). The Common Cause plaintiffs acknowledged at page 10 of their Complaint that they wanted to prevent people from being persuaded to vote for Mr. Reagan; consequently, this lawsuit was intended to "further" the Carter candidacy.

2. Section 9012(f), Read Literally, Regulates The Content Of Political Persuasion.

As the Common Cause appellants allege, the "injury" section 9012(f) is designed to prevent is the peaceful persuasion of American voters regarding their choice for President and Vice-President of the United States. Appellee AEP does not understand appellants to dispute seriously that the conduct they seek to prohibit is peaceful political advocacy, or that the reason they seek to prohibit it is that it might be found persuasive by United States citizens. Taking all of the appellants' claims about the harmful impact of independent expenditures at face value, they amount to nothing more than the fear that voters might be exposed to a wider variety of appeals by a wider variety of groups, and might be responsive to them. Such speech is at the very core of the First Amendment and is entitled to the maximum constitutional protection.

Section 9012(f) regulates content. If read literally and held constitutional, all politically significant campaign advocacy in presidential elections will have to be channeled through six routes:

(1) Activities funded by the national campaign committee subject to its discretion and the expenditure limits imposed by 2 U.S.C. §441a(b). As a consequence of *Republican National Committee* v. *Federal Election Commission*, 487 F. Supp. 280 (S.D.N.Y.) (three-judge court), 616 F.2d 1 (2d. Cir.) (en banc) (*per curiam*), *aff'd summarily*, 445 U.S. 955 (1980), individuals or grass root organizations may not make expenditures in any amounts for activities which fall within the statutory definition of coordination, such as making a storefront available to campaign volunteers or even purchasing pads and pencils for campaign phone canvassing.

(2) Use of campaign materials purchased by a local party committee or voter registration and get-out-the-vote activities "conducted" by such committees. 2 U.S.C. §431(9)(B)(viii)(ix). These activities are also subject to the discretion of local officials and their access to funds.

(3) Partisan communications by a labor organization (including the AFL-CIO federation) to its members or their families. Unions are free to use treasury funds without limit for these purposes. 2 U.S.C. §§431(9)(B)(v), 441b(b); 26 U.S.C. §9012(f)(2)(B). The record in *Republican National Committee, supra,* showed that the AFL-CIO, the Machinists Union and the United Auto Workers together spent $4.5 million on partisan political activity in 1976. 487 F. Supp. 280, 305-306 (S.D.N.Y. 1980) (Joint Findings of Fact).

(4) Partisan communications by a corporation to its shareholders, executives or administrative personnel, or their families. 2 U.S.C. §§431(9)(B)(v), 441b(b). These may be funded by general corporate funds without limit.

(5) Wealthy individuals may make independent expenditures without limit. 26 U.S.C. §9012(f).

(6) Newspapers, broadcasters, periodicals and certain non-profit institutions may engage in independent expenditures. 26 U.S.C. §9012(f)(2).

All other significant activities would be either absolutely prohibited as being in coordination, or would be subject to section 9012(f). It is little wonder that Common Cause has felt the need to emphasize in its brief that American citizens will still have the right to call into talk shows and express their views, even if Common Cause succeeds in this litigation. Common Cause Brief at 40.

These limitations are censorship of content in all but name. Most Americans do not own a newspaper, do not have sufficient wealth to fund independent expenditures, or sufficient power to affect corporate acts, or influence over labor unions. Their only alternative under the law, therefore, is to hope party or campaign officials will provide a means of political involvement. Subjecting the vast majority of citizens to the will of these officials is to condition their speech upon another's approval of its content.

Quite apart from whether national or local campaign organizations have sufficient resources to share with citizens' groups they favor, such campaign organizations will support

only those groups whose activities and message are consistent with those of the official campaign organization. No campaign or party committee worth its salt will be willing to fund individuals and groups to do or say whatever they please. Official campaigns tend to avoid hard ideological stances and shade positions on controversial issues in order to appeal to the widest possible range of voters. The professional politician and the ideologue are constantly at odds over appropriate campaign messages. Making the latter's right to speak conditional upon the approval of the former is straight-out censorship.

Conditioning the right to engage in campaign advocacy upon the approval of local or national party organizations is content regulation. It is regulation which decrees that political debate will be restricted in presidential campaigns to those ideas, messages and slogans selected by professional campaign managers. Anyone with a different message can, as the Common Cause brief callously suggests, "call in to radio talk shows." Common Cause Brief at 40.

This is no imaginary horror. The New York Times has recently reported that the Chairman of the Republican National Committee, the party which allegedly benefited in the recent campaign from independent expenditures, has demanded that conservative political action committees promise not to campaign against Democrats where local Republicans object. New York Times, June 24, 1981, at 17. Mr. Richards, who earlier had charged such committees with making "all kinds of mischief," Newsweek, June 1, 1981, at 38, said that if such a promise were made, "then we can have a semblance of peace." New York Times, *supra*. A law conditioning the speech of the independent committees upon Mr. Richards' approval is government censorship in all but name.

Recognizing the constitutional vulnerability of such a restriction, the court in *Republican National Committee, supra,* upheld the drastic effect of the coordinated expenditure prohibition only because of its view that individuals or groups

are left totally free to fund their activities by means of independent expenditures. As the court said:

> "We similarly conclude that the limitations . . . [on coordinated expenditures by groups or individuals] do not abridge the rights of supporters. The plaintiffs have shown that the effect of the public funding alternative is to decrease the importance of 'grass roots' political activity compared to privately financed campaigns. Private individuals are unable to make expenditures coordinated with the campaign organizations, such as renting vans to distribute literature, paying the cost of photocopying and distributing campaign materials received from the candidate's organization. . . . *Most important, uncoordinated expenditures are permitted without limit. Limitations on uncoordinated expenditures were held unconstitutional in Buckley* v. *Valeo*. . . ." 487 F. Supp. at 286 (emphasis added).

3. The Impact Of Section 9012(f) Is Draconian Rather Than Incidental.

The impact of a literal application of section 9012(f) upon protected speech is draconian. Like all communication, political advocacy is heavily dependent upon the availability and use of communications and other resources. Anyone seeking to purchase or rent such resources for political purposes must compete for them in the market place with others who would put them to other uses. As this Court noted in *Buckley* v. *Valeo,* 424 U.S. 1 (1976),

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media

for news and information has made these expensive modes of communication indispensable instruments of effective political speech." 424 U.S. at 19.

A limit of $1,000 on expenditures by groups seeking to engage in political advocacy is for all practical purposes a law forbidding them from engaging in significant political communication. Even at the time of *Buckley,* $1,000 would not purchase a single one-quarter page ad in a major newspaper. 424 U.S. at 40. Today that same $1,000 is worth roughly $550 in 1974 dollars. Indeed, when this Court invalidated section 608(e) of the FECA, it explicitly recognized that a $1,000 limit on independent spending by groups was a *de facto* prohibition on speech by those organizations. The Court noted that a $1,000 limitation "would appear to exclude all citizens and groups except candidates, political parties, and the institutional press from any significant use of the most effective modes of communication." 424 U.S. at 19-20.

There are vast numbers of American citizens who desire to engage in political advocacy in presidential elections and, if the judgment below is reversed, will not be able to use any of the remaining legal methods of doing so. This is particularly true of individuals who lack great wealth and are not full time party or campaign officials. Such individuals cannot engage in political communication alone. To be even reasonably effective they must be part of a group with access to the necessary resources. The three-judge court in *Republican National Committee* found, for example, that the impact of federal financing on grass roots activities was "dramatic." 487 F. Supp. at 295. Not only did national campaign committees emphasize the mass media over local activities, but the prohibition on coordinated expenditures "clearly curtailed" the funding of grass roots activities from the "bottom up." *Id.,* at 298. As a consequence, campaign headquarters were few and far between, and volunteers near a headquarters had trouble finding things to do. *Id.*, at 294.

The effect of section 9012(f), if read literally and upheld, will be to deny American citizens the sole remaining oppor-

tunity to join their efforts with others in significant political advocacy.

It should be emphasized again that the impact will not be limited to express advocacy of a candidate. Whereas section 608(e)(1), the restriction on independent expenditures struck down in *Buckley,* was limited to advocacy of "the election or defeat" of "a clearly identified candidate," section 9012(f) merely requires a "qualified campaign expense" "to further" the election of a candidate.

As explained above in part IIA2, the all-embracing language of section 9012(f) reaches issue-oriented activities, the dissemination of factual information such as voting records, and perhaps even the work of activist scholars. The room for argument about its impact in particular situations and for expansive interpretations is so great that the chilling effect itself will be enormous. Even Common Cause and the Commission do not share a common position on its terms. Even more ominously, the Commission has in no way foreclosed itself from seeking the broadest application of section 9012(f) in future enforcement proceedings.

4. Section 9012(f) Regulates Expenditures, Not Contributions.

Implicitly recognizing that this Court has ruled in the most explicit fashion that direct expenditures on political communication are constitutionally protected speech, *Buckley, supra* at 19-21, Common Cause now seeks to transform section 9012(f) into a regulation of "contributions" subject to a lower standard of constitutional scrutiny. Common Cause Brief at 21-23. Clearly, section 9012(f), like the ill-fated section 608(e)(1) struck down in *Buckley,* regulates expenditures and is thus a direct regulation of speech. This Court recently reiterated the crucial distinction between regulating "contributions" and regulating "expenditures" in *California Medical Ass'n* v. *Federal Election Commission,* _____ U.S. _____ (June 26, 1981) (Slip Opinion) at 10-16. The Court there

upheld the $5,000 limit on contributions by individuals to multi-candidate committees because it served the compelling purpose of preventing circumvention of the limitation on contributions directly to a candidate. Mr. Justice Marshall's plurality opinion specifically rejected the argument that contributions to a multi-candidate political committee were the equivalent of "expenditures . . . made *independently* by a candidate, individual or group in order to engage directly in political speech." *Id.* at 12-13, citing *Buckley, supra,* at 44-48 (emphasis in original). He concluded, therefore, that direct political expenditures by the California Medical Association were entitled to greater constitutional protection than were its contributions to a multi-candidate committee. *Id.*

The line drawn by this Court thus distinguishes between the regulation of contributions to candidates or groups and the regulation of expenditures used directly to purchase the resources necessary for political speech. Section 9012(f) is an unambiguous limit on spending for political communication and in no sense regulates contributions to groups or candidates. It thus runs afoul of the First Amendment.

Common Cause's argument is principally directed at the method of fundraising and governance of some of the organizations which section 9012(f), read literally, would affect. It is true that some political committees may raise money by mail from contributors who lack direct control over the activities of the organization. If such fundraising and organizational structure represent a danger, however, redress should be in the form of legislation directed to those particular problems, rather than a plea to this Court to uphold a statute restricting direct spending by all "political committees," no matter how they raise their money or how they are governed.

According to the Common Cause argument, First Amendment protection extends only to "personal speech." Common Cause Brief at 20. There is no support for this pernicious suggestion. No court has ever held that a picket is not entitled to constitutional protection unless he or she personally

composes the language on the sign carried, or that advertisements on national issues must be written by those who purchase them. Were such a doctrine accepted, the ability to engage in significant political discussion and advocacy would be limited to a few articulate individuals with great wealth and campaign or party committees to support their messages.

5. Section 9012(f) Infringes Freedom Of Association.

The constitutional recognition of freedom of association as essential to a free society is a recognition of the imperatives of political communication which are even more pressing in our own age. "Personal speech" is of no political significance, except for the few. For those without substantial means, effective speech is available only through participation in groups which raise money and are rarely directly controlled by their membership or contributors. The necessity for preserving such rights has long been recognized by this Court in cases involving contributions to such organizations. *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). In fact, *Buckley, supra*, expressly recognized that a $1,000 limitation on independent expenditures "relative to a clearly identified candidate *precludes most associations from effectively amplifying the voice of their adherents, the original basis for the recognition of First Amendment protection of the freedom of association.*" 424 U.S. at 22 (emphasis added) (quotations omitted).

B. There Is No Compelling Governmental Interest Justifying A Limitation On Independent Expenditures.

Given the plain fact that Congress did not intend section 9012(f) as a limitation on expenditures independent of a campaign, *see* Part I, *supra*, it could hardly have discerned a compelling need to limit them. In fact, just as appellants' recitation of legislative history touches upon everything but the specific history of section 9012(f), their catalogue of

"compelling interests" served by misreading that section is wholly the product of their attorneys' imagination, rather than a considered judgment by the Congress.

1. Section 9012(f) Does Not Deter Corruption Or The Appearance Of It.

While appellants hint that corruption (or the "appearance" of it) is deterred by their reading of section 9012(f), *Buckley, supra,* is directly contrary to this argument. While *Buckley* held that direct *contributions* to a candidate might be limited in the interest of avoiding corruption or the appearance of corruption, it specifically held that *expenditures* independent of a campaign posed no such danger. As the Court stated,

> "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate. Rather than preventing circumvention of the contribution limitations, §608(e)(1) severely restricts all independent advocacy despite its substantially diminished potential for abuse." 424 U.S. at 47.

Independent expenditures are crucially different from contributions. Groups making independent expenditures may not, under the FECA and Subtitle H, be privy to a campaigner's polls which continuously track not only voters' preferences in particular states but also their views on certain issues and their images of the candidates. These polls are not stable over time, and different polls may not agree. *See generally, Face Off: A Conversation with the Presidents' Pollsters Patrick Caddell and Richard Wirthlin,* 3 Public Opinion 2 (Dec./Jan. 1981). Nevertheless, these polls shape the campaign's detailed strategy, which is the product of discussion of the campaign's professional managers, including

advertising consultants. Different managers and different consultants will not necessarily make the same decisions even when using the same data. Among the decisions to be made are: developing or counteracting certain images, including the means of doing so; stressing or avoiding certain stances on issues and the means of doing so; whether to stress the positive side of one's candidate or to attack the negatives of the adversary and the means of doing so; how to react to unforeseen events during the campaign such as a mistatement by one of the other candidates; how to react to unforeseen events in the nation or the world in a fashion which is effective; in which regions and which states to concentrate the limited resources of the campaign. Each decision must take into account all other decisions. Moreover, these decisions are made and revised continuously as their success or failure becomes evident, polls reveal new trends, or events overtake the campaign.

So long as coordination with campaigns is not permitted, independent expenditures are *not* the equivalent or even rough equivalents of contributions. This is so even when undertaken by well-financed groups, much less by every group capable of raising $1,000. Campaign managers will view any deviation from the current strategy with hostility, no matter how well-intentioned. To them, independent expenditures are more a threat than a benefit.

Moreover, if the prevention of corruption is the purpose of section 9012(f) and independent expenditures are equivalent to contributions, the failure to limit spending by wealthy individuals is inexplicable. The arguments presented to this Court (and accepted by it) in *Buckley* in defense of the FECA's limitations on individual contributions were sharply focused upon the need to limit what one person might give to a candidate. Now the same parties in essence are arguing that the real need is to prevent small contributors from pooling their dollars to be spent by an organization. *Buckley* v. *Valeo*, Brief for Appellees Center for Public Financing of Elections,

Common Cause, League of Women Voters of the United States *et al.*, 46 *et seq.*, 55-58, 65 *et seq.*, and 79-80.

2. Reducing The Influence Of A "Handful" Of Fundraisers Is Not A Compelling Governmental Interest Justifying The Restrictions Of Section 9012(f).

Appellants also argue that section 9012(f), read literally, serves the purpose of reducing the influence of private fundraisers. As the appellants' briefs make clear, even when taken at face value, this allegation is based on "evidence" which came into existence long after Congress passed section 9012(f), and which it could not have foreseen. The development of direct mail fund raising was in an embryonic stage in 1971 and has achieved whatever significance it presently has partly as a consequence of the 1974 FECA, which limited the size of permissible contributions to candidates. Moreover, the "influence" argument is subject to all of the infirmities of the corruption argument, including overbreadth. A statute limiting independent expenditures by organizations to $1,000 is hardly justified by Common Cause's finding that, in their own words, a "handful" of fundraisers have what they regard as undue influence.

In any event, the prevention of corruption, the only compelling purpose recognized in *Buckley, supra,* is an entirely different legislative goal from reducing political influence. As this Court said in *Buckley,* "To the extent that large contributions are given to secure a political *quid pro quo* . . . the integrity of our system of representative democracy is undermined." 424 U.S. at 26-27.

Independent spending, however, is crucially different. If any such obligation is ever created, it arises after the election solely as a consequence of voter persuasion resulting from pure political speech. The money is not given to a candidate to spend as he or she will, thus becoming responsible for the consequences. Independent spending helps or hurts candidates

only to the extent it persuades voters. As a consequence, the "influence" argument is a direct attack on speech designed solely to persuade the voting public.

Common Cause itself alleges that it is an organization of some 225,000 dues-paying members which is designed to influence government. Common Cause, Amended Appendices to Jurisdictional Statement at 72a. Large sums of money are clearly essential to its activities which are, in turn, determined by its officers, who seek influence with elected officials. Its members are "essentially anonymous." Common Cause Brief at 29. The sole difference is that Common Cause seeks to persuade officeholders directly, while independent party groups seek first to persuade voters and then (if in fact they seek to exert direct influence) to persuade officeholders.

If anything, the latter groups' activities more directly involve the democratic process. They raise money through ideological appeals (as do countless issue groups) which they use to persuade voters to vote for candidates sharing similar values. Common Cause quibbles with the district court's assertion that fundraisers must attend to the ideological concerns of donors. Common Cause Brief at 43. That, however, is a notorious political truth. Groups of donors are not fungible. The National Conservative Political Action Committee cannot exchange donor lists with Common Cause or suddenly endorse Dr. Barry Commoner and still continue to raise large amounts of money. Appellants seem to view small donors and voters as helpless pawns prone to react randomly to any appeal no matter who the candidate or what the cause. The First Amendment does not share that bleak view of the American citizen.

C. Section 9012(f), Read Literally, Invidiously Discriminates Among Speakers And Messages.

Political speech is "indispensible to decisionmaking in a democracy" by virtue of its capacity for "informing the public" and cannot be limited on the basis of the "identity of

its source, whether corporation, association, union or individual." *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 777 (1978). A law which forbids speech for some kinds of individuals or groups while permitting it for others amounts to a regulation of the content of speech. *Police Department* v. *Mosley,* 408 U.S. 92 (1972) (ordinance forbidding picketing of schools except by labor organizations).

Section 9012(f), read literally, makes wholly unjustifiable — not to say bizarre — distinctions between speakers and, as a consequence, between political messages. In restricting the speech of political committees but not the speech of individuals, section 9012(f) inherently favors the wealthy. In addition, subsection (2) of section 9012(f) exempts from the $1,000 expenditure limitation (1) expenditures made by the institutional press in communicating news or editorials, and (2) expenditures by certain tax-exempt organizations made in communicating to their members. These exemptions from the otherwise draconian provisions of section 9012(f) render it unconstitutional.

1. Section 9012(f) Unconstitutionally Discriminates According To Wealth.

By restricting its drastic limitations to political committees, section 9012(f) for all practical purposes prevents small contributors from pooling resources in organizations which can fund meaningful political communication. For vast numbers of citizens, this is the only remaining legal avenue for effective political participation in presidential elections. *See supra,* pp. 20-30. For persons wealthy enough to fund their own independent expenditures, however, section 9012(f) imposes no limitation whatsoever. Appellants have suggested no reason, however insubstantial, for silencing groups of small contributors while allowing wealthy individuals unlimited freedom. Such a distinction clearly runs afoul of the Constitution. *Mosley, supra; Harper* v. *Virginia State Board of Elections,* 383 U.S. 663 (1966).

Common Cause's "narrowing" interpretation of section 9012(f), if accepted, would aggravate this already discriminatory legislation. Those appellants suggest that small numbers of individuals who know each other can pool their funds without limit for purposes of political communication, so long as each individual participates in major decisions. The net effect, of course, is to allow wealthy individuals to amplify their voice by pooling their funds in small, affluent groups, limited only by the need for personal contact, while larger groups of persons with more modest means attempting to pool their smaller expenditures are silenced. Any such statutory scheme is *a fortiorari* unconstitutional.

Finally, this interpretation simply does not wash with the statutory scheme. As soon as two individuals join together to form a group, they constitute a "political committee" under FECA. Even if such a group were free to make expenditures under section 9012(f), its efforts to raise money would, of course, be subject to the contribution limitations under FECA. Thus, while an individual could make unlimited expenditures in support of a candidate, two individuals working together would be limited to two times the contribution limit, or $10,000, the maximum the two could contribute to the political committee. 2 U.S.C. §441a(a)(1)(C).

2. Section 9012(f) Cannot Constitutionally Distinguish Between Advertising By Independent Committees And The Press.

This Court has recognized time and again the centrality of a free press to the First Amendment. *See, e.g., Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974); *Mills* v. *Alabama,* 384 U.S. 214 (1966). By exempting the institutional press from the reach of section 9012(f), Congress properly was of the view that the limitations of that section could not be constitutionally applied to such organizations. We vigorously subscribe to that sentiment.

However, at no time has the Court declared that the institutional press is entitled to a preferred position under the First Amendment in expressing editorially its political views. Rather, the Court has spoken of "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open," *New York Times Co.* v. *Sullivan,* 376 U.S. 254, 270 (1964). Communications are no less protected simply because they are made by persons "who wish to exercise their freedom of speech even though they are not members of the press [citation omitted]." *Id.*, 376 U.S. at 266. To conclude otherwise would be to

> ". . . shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities . . . the effect would be to shackle the First Amendment in its attempt to secure the widest possible dissemination of information from diverse and antagonistic sources." *Id.* (Quotation omitted).

Section 9012(f)(2)(A) exempts from its restrictions "editorial" (*i.e.,* advocacy) rights of "broadcasters" and "periodical publications." It does not exempt publishers of books or non-periodical works, of handbills or other, similar publications. While the institutional press plays a crucial role in the dissemination of information and ideas, other groups, like AEP, are equally deserving of the "fullest and most urgent application" of speech rights which the First Amendment reserves for "the conduct of campaigns for political office." *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 272 (1971).

While the institutional press may without regard to expenditure limitations publish and disseminate editorials endorsing particular candidates, independent committees may not pay to have such an editorial (or opposite endorsement) republished as an advertisement or handbill without being subject to the $1,000 limit of section 9012(f). This attempt by section 9012(f) to grant preferential speech rights to some at the expense of others "is wholly foreign to the First Amendment. . . ." *Buckley,* 424 U.S. at 49. Committees like AEP,

which intend independently of the candidate to devote their resources to communicate effectively, through scarce and expensive access to modern media, are no less important to political advocacy than is the institutional press, and no less protected under the First Amendment.

3. *Section 9012(f) Unconstitutionally Discriminates In Favor Of Tax-Exempt Organizations.*

Section 9012(f) also exempts "expenditures by any organization described in section 501(c) of this title which is exempt from tax under section 501(a) of this title in communicating to its members the views of that organization." 26 U.S.C. §9012(f)(2)(B). IRC section 501(c) includes a widely diverse class of organizations and associations, many of which have potentially enormous memberships. It includes, for example, labor and agricultural organizations; chambers of commerce; fraternal orders; cooperative telephone companies; cooperative and mutual lending institutions; and contributory pension funds. Allowing the leaders of unions or chambers of commerce to attempt to influence the votes of their members while, at the same time, prohibiting their fellow citizens in other groups from doing so, systematically discriminates not only against speakers, but also against messages.

The fact of the matter is that communications by the U.S. Chamber of Commerce and the UAW to their "members" are in reality communications to large, politically significant segments of the voting population. In 1976, the AFL-CIO, the Machinists Union, and the United Auto Workers together spent $4.5 million on such political advocacy. *See Republican National Committee, supra,* at 305-306 (Joint Findings of Fact). There is thus no rational basis for allowing these economic interest groups to amass gigantic war chests and to engage in unlimited political speech with their "members" while preventing other organizations, such as AEP, from communicating with large segments of the population as well.

D. Section 9012(f) Is Unconstitutionally Vague.

A further defect of section 9012(f) is its lack of any clear delineation between the lawful and the unlawful. This defect in itself chills speech and association: "Uncertain meanings" inevitably lead citizens to "steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned* v. *City of Rockford,* 408 U.S. 104, 109 (1972) (quotation omitted). An earlier section of this brief has discussed in detail the breadth of section 9012(f)'s language. *Supra* at 20-29. Read literally, it reaches issue discussion, the dissemination of factual material such as voting records, and even support for university scholars.

The analysis of the Court in *Buckley, supra,* compels the conclusion that section 9012(f) is void for vagueness. 424 U.S. at 40-44. Section 608(e)(1) prohibited expenditures "relative to a clearly identified candidate." In order to avoid the vagueness of the term "relative," the Court interpreted the provision in light of the additional requirements in section 608(e)(1) that the expenditure be made "advocating the election or defeat of" a candidate. However, the Court was also concerned that even this did not solve the problem of distinguishing "between discussion of issues and candidates and advocacy of election or defeat of candidates [which] may often dissolve in practical application." 424 U.S. at 42. In order to avoid "invalidation on vagueness grounds," the Court concluded that "§608(e)(1) must be construed to apply only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office." 424 U.S. at 44.

Unlike section 608(e)(1) of the FECA, however, section 9012(f) contains no language on which a saving construction can be based. The language "to further the election of such candidates" does not require that the candidate be "clearly identified" or that the communication be in "advocacy" terms, much less in "express terms." While section 9012(f) contains the additional requirement that the expenditures be

of the nature of "qualified campaign expenses" made by a candidate, that term is itself defined to mean expenses "to further" the candidate's election. 26 U.S.C. §9002(11).

A criminal statute which directly and facially limits expression and association cannot be so vaguely drafted that it forces the lawful to steer so wide of "the unlawful zone" that "[i]t can only result in a deterrence of speech which the Constitution makes free." *Speiser* v. *Randall,* 357 U.S. 513, 526 (1958). Like the statute requiring state employees' oaths in *Baggett* v. *Bullitt,* 377 U.S. 360 (1964), the uncertainty of application of section 9012(f) will in itself tend to suppress speech because persons will restrict their conduct to that which is unquestionably safe — no expenditures over $1,000 in the presidential election.

Common Cause's attempt to "narrow" the meaning of section 9012(f) fails to redeem that statute. Even if "political committees" under section 9012(f) do not include "groups of individuals who engage jointly in personal expression paid for out of their own pockets," Common Cause Brief at 35, the unconstitutional vagueness is not cured. "Personal expression" is hardly a term covering a well-defined set of activities. How disproportionate may the contributions by individuals be, and how active must marginal participants be before the group becomes a "political committee?" May one member of the group undertake the authorship of its advertising, or must all advertising be cleared by every member? Endless questions like these will arise from the Common Cause interpretation with the result that few, if any, individuals will dare run the potential risks of criminal prosecution should their activities fall outside Common Cause's "narrowed" version of section 9012(f). Moreover, litigation over the issue will inevitably involve detailed discovery of the organizational and operational activities of small groups of citizens, a speech-chilling prospect in itself.

CONCLUSION

For the reasons stated above, Appellee Americans for an Effective Presidency respectfully submits that the questions presented by Appellants are not substantial federal questions and, therefore, that their appeals should be dismissed, or, in the alternative, that the judgment entered by the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

RALPH K. WINTER
323 Sterling Law Building
127 Wall Street
New Haven, Conn. 06520
(203) 436-4681

RODERICK M. HILLS
ROBERT K. BURGESS *
ROBERT B. SHANKS
EDWARD SONNENSCHEIN, JR.
LATHAM, WATKINS & HILLS
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036
(202) 828-4400

Attorneys for Appellee
AMERICANS FOR AN
EFFECTIVE PRESIDENCY

* *Counsel of Record*

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